STATE OF MICHIGAN

IN THE SUPREME COURT

MARLETTE AUTO WASH, LLC, Plaintiff/Cross-Defendant/Appellant, v VAN DYKE SC PROPERTIES, LLC, Defendant/Cross-Plaintiff/Appellee. /	Supreme Court No. 153979 Court of Appeals No. 326486 Sanilac County Circuit No. 14-035490-CH Hon. Donald A. Teeple

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APPELLANT MARLETTE AUTO WASH, LLC'S REPLY TO REAL PROPERTY LAW SECTION'S *AMICUS CURIAE* BRIEF

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REPLY ARGUMENT

The Real Property Law Section rightly recognizes the major jurisprudential significance of the issue presented, that is, whether a prescriptive easement runs with the land after it vests in a predecessor absent tacking or prior judicial action. (Section Br 1.) The Section acknowledges the apparent conflict between this Court's precedent and the Court of Appeals' new rule that requires either (a) tacking, (b) judicial action, or (c) 10 more years of adverse use beyond the statutory 15-year period, before the prescriptive easement will run with the land (the "New Rule"). (*Id*. at 2–3.) And it rightly calls attention to the conflicting decision in *Methner v Village Sandford*, No. 154505 (Mich Sup Ct, application filed Sep 30, 2016)—where the Court of Appeals applied Marlette's view of this Court's precedents. (Section Br at 2–3.) But the Section nevertheless argues for this Court to limit those precedents to its facts and adopt the New Rule, solely to protect innocent purchasers of the burdened estate and their title insurers from a potential lack of notice. This policy concern is ill-conceived because it is based on a view of prescriptive easement law that is inaccurate and incomplete; it overlooks Michigan's prescriptive-easement doctrine of nonuser.

As an initial matter, the Section's position that an easement should *not* automatically vest after 15 years of continuous, notorious, and adverse use runs against the grain of this Court's longstanding precedent. It has long been the policy of this State that property rights acquired by adverse possession "vest" upon the expiration of the 15-year limitation period. *Gardner v Gardner*, 257 Mich 172, 176; 241 NW 179 (1932), cited in *Gorte v Dep't of Transp*, 202 Mich App 161, 168; 507 NW2d 797 (1993) (applying this policy to easements). Not after 25 or 30 years—after 15 years. As this Court put it: "If one sleeps on his rights for *fifteen years* as against an intruder of his real estate, whether such at time of entry, or after permissive entry by

known repudiation of leave, and assertion of right, *the title is lost* to the sleeper *and vested* in the usurper." *Id*. at 176 (emphasis added). And this Court has *never* required tacking to convey a vested easement—prescriptive or otherwise. See *Haab v Moorman*, 332 Mich 126, 144; 50 NW2d 856 (1952).

The Section argues for a change in this policy only out of concern that property owners will lack notice:

> Such a ruling would be unfair to property owners and the title insurers as it would give rise to unrecorded easements that are not known and cannot be determined currently. Taken to its logical extreme, an owner of property could claim prescriptive easement rights over property many years after the use had been abandoned, by showing some 15 year period of use over the course of the property's history. There would be no way for a potential purchaser to know or determine if such rights exist, because no current use would be required to evidence them. [Section Br 15.]

The Section's concern is understandable, but a prescriptive easement results only from continuous open and notorious use, *Wortman v Stafford*, 217 Mich 554, 559; 187 NW 326 (1922), so by definition, it would have to be noticeable at the time it was established. Only after long periods of nonuse is the 15 years of open and notorious use likely to be forgotten through succession and fading memory, and this Court already developed a rule to solve that specific problem.

In *McDonald v Sargent*, this Court echoed the Section's concern, stating: "if the easement by prescription is not lost by nonuser for a period of 25 years it might continue indefinitely and purchasers of the claimed servient estate, without notice, be bound thereby." 308 Mich 341, 344; 13 NW2d 843 (1944). It solved this problem directly by adopting a rule with appealing symmetry: "[a] servitude easement imposed by prescriptive user for 15 years is lost by nonuser during a like period of 15 years." *Id*. at 345. Thus, if a successor did try to resurrect an age-old prescriptive easement after a sufficiently long period of nonuse, it would not "wreak havoc on

property owners" as the Section posits (see Section Br 15). It would instead be extinguished under *McDonald*.

Unlike the *McDonald* nonuser rule, the New Rule does practically nothing to solve the Section's notice concern. First, the New Rule operates only when there is a transfer of the dominant estate, even though lack of notice could only become a problem in a transfer of the servient estate. Second, a prescriptive easement could still vest unrecorded "many years" after the statutory period has run (as little as 10)—either through continued adverse use by the same owner or by a successor who successfully preserved the easement through a parol statement. (See Section Br 14.) Such an easement would be no more noticeable in the chain of title than it was when the 15-year period had run. And long periods of nonuse would still give rise to the same notice problem for these unrecorded easements, as much as if the easement had automatically vested after 15 years. Ultimately, the Section offers no explanation as to why the legislative choice of 15 years is inadequate or how adding these additional requirements does anything to address the concern regarding notice.

Worse, in the bulk of situations where the New Rule would extinguish the easement, there would be no notice problem at all. This case is a fitting example. Notice was not a problem here because (a) the use of the shopping center for access is obvious from looking at the configuration of the car wash, (b) the adverse use was only interrupted for a few months during a mortgage-loan default and resale, and (c) the servient-estate purchaser had actual notice of the easement, since its owner, James Zyrowski, was the one who established it in the first place. (See Marlette Appl 4–5.) Any one of these circumstances alone would obviate notice concerns when the dominant estate is conveyed, but the New Rule would nevertheless extinguish the prescriptive easement every time. This New Rule will more often than not destroy vested easement

rights for the sake of notice when notice is not lacking. If there is a rule that will "wreak havoc," it is this New Rule created by the Court of Appeals—especially for those successors, such as heirs or a foreclosing mortgagee, who receive no opportunity to satisfy this new tacking or judicial-action requirement to preserve the easement.

CONCLUSION AND REQUESTED RELIEF

The Real Property Law Section has properly alerted this Court to the major jurisprudential significance of this appeal, and the Court should grant its request for further review to clarify its existing precedents and resolve the confusion in the lower courts over when a prescriptive easement begins to run with the land. But it should ultimately reject the Section's request to add requirements for vesting beyond the 15 years of continuous, open, notorious, and adverse use that Michigan's Legislature (see MCL 600.5801) and longstanding precedent (*Gardner* and *Haab*) consider sufficient, and reverse the Court of Appeals' decision to impose those additional requirements in this case.

Respectfully submitted,

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